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THE LAW OF THE SEA:

SOME RECENT DEVELOPMENTS

(With Particular Reference to the United Nations

Conference of 1958)

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S.

Government, the U.S. Department of the Navy or the Naval War College.

CHAPTER V

HIGH SEAS PROBLEM SITUATIONS

A. PROBLEM 1: Right to Board and Inspect a Foreign Vessel on the High Seas Thought To Be Guilty of Damaging Transatlantic Cables

The facts and several of the issues of this problem—an actual case—are set forth in an exchange of notes between the United States and the Soviet Union during February and March, 1959. (See below.) In reading this exchange of notes it will be well to keep in mind certain pertinent provisions of the 1958 Geneva Convention on the High Seas,¹ which had been signed by both the United States and the U.S.S.R. prior to the incident.²

Article 2 of the Convention on the High Seas enumerates, among others, the *freedom to lay submarine cables and pipelines*. The article also includes a corollary duty in providing that this freedom (as well as the others which are enumerated and additional ones required by international law) “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”³ The essence of this provision is that each user of the high seas must accommodate every other user in order to have the least possible interference among all users commensurate with the maximum utilization of the high seas.

Hence, the article provides for certain enumerated rights (i.e., “freedoms”) on the high seas, both for coastal and non-coastal states, and at the same time expresses a general duty or obligation of each state which exercises those rights to be reasonable in doing so. Reasonableness in the context of the problem situation here, involving damage to five submarine cables by a trawler, means that in exercising its right to fish in the high seas, the fishing vessel must not wilfully or negligently damage the cables. This is the minimum standard of duty to which the trawler may be held, and it should be noted that Article II of the 1884 Convention For the Protection of Submarine

¹ U.N. Doc. A/CONF. 13/L. 53 and corr. 1 (1958).

² See Appendix J, p. 264. Although both states have signed the Convention on the High Seas, neither had ratified it at the time of the incident.

³ See Appendix B for a complete text of the Convention on the High Seas.

Cables ⁴ to which both the United States and the U.S.S.R. are parties, expressly establishes this duty by making a wilful or culpably negligent damage to the submarine cable a punishable offense.⁵

Articles 26 to 29, inclusive, of the Convention on the High Seas also contain provisions relating to submarine cables which should be kept in mind in analyzing the exchange of notes between the United States and the Soviet Government :

“ARTICLE 26

“1. All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

“2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.

“3. When laying such cables or pipelines the State in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

“ARTICLE 27

“Every State shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

“ARTICLE 28

“Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

⁴ 24 Stat. 989, 25 Stat. 1424. For the text of the pertinent sections of the Convention for the Protection of Submarine Cables (1884), see *infra*, p. 165.

⁵ *Ibid.*, at Art. II.

“ARTICLE 29

“Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.”

EXCHANGE OF NOTES BETWEEN UNITED STATES AND SOVIET GOVERNMENT ON DAMAGE TO SUBMARINE CABLES FROM FEBRUARY 21 TO 25, 1959 ⁶

U.S. Aide Memoire of February 28, 1959

The Embassy of the United States of America has been instructed to inform the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics of the following:

Between February 21–25, 1959, four telegraph and one voice transatlantic cables were damaged and put out of service. Aerial investigation disclosed that the Soviet trawler NOVOROSSIISK No. RT-99 was in the area of these cable difficulties.

In accordance with the “Convention for Protection of Submarine Cables” of 1884, to which the Soviet Union and the United States are parties, a U.S. naval vessel put a visiting party on board the NOVOROSSIISK on February 26 to investigate whether the trawler had violated the Convention.

After discussion with the Trawler Captain and examination of the log, the boarding officer from the U.S.S. R. O. HALE made an appropriate entry in the journal of the trawler as required by Article X of the Convention and the visiting party left the vessel. The trawler’s log indicated that the ship had been in the area of cable damage at the time of the last service interruption. It is understood that the trawler proceeded on its way without delay.

A cable repair ship is en route to the area of cable damage for final investigation and repair.

Soviet Note of March 4, 1959

The Ministry of Foreign Affairs refers to the aide memoire of the United States Embassy of February 28 concerning the detention and inspection of the Soviet trawler NOVOROSSIISK on February 26 by an American vessel and considers it necessary to declare the following:

⁶ *State Dept. Bull.* Vol. XL No. 1034, pp. 555–558, (April 20, 1959).

According to information available to competent Soviet organs, the Soviet trawler NOVOROSSIISK was engaged in fishing in the open sea in the Northern Atlantic Ocean and caused no damage of any kind to the underwater telegraph or telephone Trans-Atlantic cables. Reports concerning this question appearing in the American press are figments of the imagination.

Consequently, the American naval vessel R. O. HALE had no reason for detaining and inspecting the aforementioned Soviet trawler. Attention must be called to the fact that these actions of the American authorities were undertaken specifically with respect to a Soviet vessel at a time in the region of Newfoundland when there were hundreds of vessels from other countries engaged in fishing and, as reported, many of which have more than once damaged Trans-Atlantic cables.

The Soviet Government cannot ignore the fact that in connection with the above-indicated actions of the United States authorities numerous reports have appeared in the American press containing various anti-Soviet fabrications concerning the purpose of the presence of a Soviet fishing vessel in this region. These articles in the American press are of such a kind that the impression is unavoidable that all this venture with the detention of the Soviet trawler was undertaken with provocative purposes. Not the least among these purposes is an attempt to strain Soviet-American relations. It is impossible in this connection not to draw attention to the responsibility which the American Government takes upon itself by taking such steps.

The Soviet Government protests against the detention and inspection of the Soviet fishing trawler NOVOROSSIISK by the American naval vessel and anticipates that the Government of the United States will take all necessary measures to prevent further such completely unjustified actions with respect to Soviet fishing vessels engaged in the fishing trade in waters of the open sea.

U.S. Note of March 23, 1959

The Embassy of the United States of America refers to the Ministry's note No. 17/OSA, dated March 4, 1959 concerning recent breaks in certain transatlantic submarine tele-communication cables and the consequent visit to the Soviet trawler NOVOROSSIISK by a boarding party of the U.S.S. ROY O. HALE, which was the subject of the Embassy's aide memoire of February 28, 1959.

The Ministry's note states in substance that the Government of the Union of Soviet Socialist Republics (1) in accordance with information available to it denies that the Soviet trawler NOVOROSIISK was responsible for the reported breaks in the transatlantic submarine cables; (2) that in its opinion the United States naval vessel U.S.S. ROY O. HALE had no reason to detain and inspect the Soviet trawler NOVOROSIISK; and (3) that based on articles which have appeared in the American press concerning the purpose of the presence of a Soviet fishing vessel in this region the detention of the Soviet trawler was undertaken with "provocative purposes." The note concludes that "The Soviet Government protests against the detention and inspection of the Soviet fishing trawler NOVOROSIISK by the American naval vessel and anticipates that the Government of the United States will take all necessary measures to prevent further such completely unjustified actions with respect to Soviet fishing vessels engaged in the fishing trade in waters of the open sea."

For the reasons set out hereinafter the United States Government considers there is no basis for a protest in this case and the Soviet protest is therefore rejected. Furthermore, the United States Government is surprised that the Soviet Government should make a charge that the detention of the Soviet trawler was for "provocative purposes" with no other basis than apparent irritation at articles in American newspapers speculating on the purposes of Soviet trawlers in certain waters. As the Soviet Government well knows, the American press is free within legal limits to publish its opinions and these do not engage the responsibility of the Government. Charges based on such flimsy support are not themselves calculated to further friendly relations.

The facts of the matter are as follows:

During the period February 21 through February 25, 1959, communications were disrupted by damage to five transatlantic cables in the Newfoundland area located within a rectangle bounded by the following coordinates:

latitude 49°24' N., longitude 50°12' W.;
 latitude 49°32' N., longitude 49°48' W.;
 latitude 50°13' N., longitude 51°00' W.;
 latitude 50°22' N., longitude 50°36' W.

The first break occurred on February 21, 1959, at 10:43 a.m., eastern standard time, in the transatlantic cable owned and operated in part jointly with a Canadian company by the American Telephone and Telegraph Company, a United States corporation having its head office at New York, New York. The cable has its west terminus

in Newfoundland and the east terminus in Scotland, and it ultimately connected with the United States of America by submarine cable and radio relay.

The second break occurred on February 24, 1959, at 2:20 p.m., eastern standard time, in the transatlantic cable 1-VA, connecting Newfoundland and Ireland. The third break occurred on February 25 at 2:50 a.m., eastern standard time, in the transatlantic cable 3-PZ connecting Newfoundland and England. The fourth cable break occurred on February 25 at 11:20 a.m., eastern standard time, in cable 2-VA connecting Newfoundland with Ireland. The fifth break occurred on February 25 at 4:20 p.m., eastern standard time, in the transatlantic cable 4-PZ connecting Newfoundland and England. These four submarine cables connect ultimately with the United States, and are owned and operated by the Western Union Telegraph Company, a United States corporation with its head office at New York, New York.

Subsequent examination showed that there were a total of twelve breaks in the five cables. Nine of these were tension breaks and three were man-made cuts severing the cables.

Aerial observation conducted by the American Telephone and Telegraph Company sighted the Soviet trawler NOVOROSSIISK RT-99 on the morning of February 25, 1959, in the approximate position latitude 49°34' N. and longitude 50°00' W., steaming on a southerly course at a speed of about three knots. No other vessels were visible at the time in the immediate vicinity. The aircraft succeeded in dropping a note on the deck of the trawler NOVOROSSIISK advising that it cease trawling in the area.

The Government of the United States, acting under the provisions of Article X of the Convention for the Protection of Submarine Cables, of 1884, to which both the United States and the Union of Soviet Socialist Republics adhere, and also in conformity with United States law (47 United States Code, Section 26), implementing the convention, on February 25, 1959, dispatched the United States radar picket escort U.S.S. ROY O. HALE to the area to investigate the reported breaks in the submarine cables. On February 26, 1959, about 11:55 a.m., eastern standard time, the Commander of the U.S.S. ROY O. HALE sent a party consisting of one officer and four enlisted men, without arms, aboard the Soviet trawler NOVOROSSIISK. At the time of the visit the trawler was in position latitude 48°26' N., longitude 49°10' W. There were no other ships in the immediate vicinity.

The last four cable breaks referred to above were all located within 14 miles of each other and were each within a 12-mile radius of the observed position of the trawler NOVOROSSIISK on February 25,

1959, with the nearest two breaks no more than five miles distant. The five reported cable breaks all occurred within a radius of 52 miles of one another. (All references are to nautical miles.) A line joining the last four reported positions of the breaks is a straight line with the breaks occurring in succession in the direction of approximately 160° T. A vessel in that vicinity trawling in a general southerly direction during the period in question would have been in the locations necessary to cause the breaks.

The boarding officer, communicating by means of French through an interpreter, duly informed and explained to the master of the trawler NOVOROSSIISK the purpose of his visit and his authority to do so under the provisions of the convention of 1884. He examined, with the consent and acquiescence of the master, the papers of the trawler which appeared to be in order.

The boarding officer found that the latitude and longitude which the trawler NOVOROSSIISK recorded in her journal for the previous days' positions also showed her to have been in the immediate vicinity of all five cable breaks. Upon request, the master produced the message dropped on the deck of the trawler on the previous day from the aircraft of the American Telephone and Telegraph Company. On the basis of the foregoing evidence, the boarding officer concluded that an examination of the fishing gear and equipment was justified to determine whether the trawler was capable of causing the cable breaks.

The unarmed boarding officer, with the consent of the master of the trawler, observed without deep examination, on the upper deck of the trawler only, the trawling equipment and fishing gear. The boarding officer noted that the trawling equipment was of the type for deep sea fishing, and was in general fairly new, with the exception of the otter boards and net discs which were well worn and in poor condition. The trawling cable was estimated to be about 300 fathoms in length, sufficiently long enough to drag the gear on the bottom at the depth in the area—about 180 fathoms. Two broken sections of trawling cable each about 60 feet in length were observed wrapped around the hatch on deck. The four ends of these cables were shredded and frayed and appeared to have parted as a result of a sudden strain such as could have been caused by snagging the gear. These sections are identical in type, age, and condition with the trawling cable. Some of the fish observed lying frozen on deck were of the bottom type.

The visit on board the trawler lasted about 70 minutes, and was completed at 1:05 p.m., eastern standard time. At the time of his departure the boarding officer made the following entry in the trawler's journal:

1355—The NOVOROSSIISK (RT-99) motor vessel this date has been visited by me at Longitude 49°10' W., Latitude 48°26' N., and at 1355 (time+3) 26 February 1959. I have examined the ship papers and found them to appear regular, but the presence of a message drop regarding cut "submarine" cables signed by Capt. R. Cooper, A/C CF-CPR indicated further investigation of fishing equipment required. All papers sighted bear my signature. The Captain consented to such further inspection but appeared dubious of the number of men to inspect.

/s/ D. M. SHEELY
Lt., U.S. Navy

1440—Completed Inspection and departed.

/s/ D. M. SHEELY
LT., U.S. Navy

A preliminary report emanating from the cable repair ship LORD KELVIN which has since repaired the first broken cable states that the eastern portion of the damaged cable had been badly scraped and scuffed for about a mile east of the break. The cable had been severed by cutting. The technical opinion is that such evidence indicates that a trawler had picked up the cable with its drag, then having pulled it on deck, had cut it to release the nets.

The protection of submarine telecommunications cables on the high seas constitutes an international obligation. The locations and presence of the transatlantic submarine cables that have been cut are widely known among world fishing and maritime circles. They are shown and marked on United States admiralty and navigation maps which are available to the general public.

The above-stated record of events shows that, contrary to the assertions and charges made in the above-mentioned note of the Union of Soviet Socialist Republics, the visit to the Soviet trawler NOVOROSSIISK under the circumstances shown was entirely justified and was in every respect in accordance with international law and applicable treaty provisions.

The Government of the United States is satisfied that the evidence in its possession raises a strong presumption that the master and crew of the Soviet trawler NOVOROSSIISK have violated Article II of the convention of 1884 above-mentioned which provides that "the breaking or injury of a submarine cable, done wilfully or through culpable negligence, and resulting in the total or partial interruption" of telegraphic communication shall be a punishable offense.

Article VIII *et seq.* of the convention place the responsibility for the repression of these violations of the convention and trial and punishment of the violators on the Soviet Union. Therefore, the

Government of the United States calls upon the Government of the Union of Soviet Socialist Republics to discharge its international obligations as summarily as its laws and regulations will permit, by promptly making such investigations and taking such measures as are necessary to punish those who may be found to be guilty.

The Government of the United States reserves the right to make such claims for damages as may be found to be warranted.

The Government of the United States further expects that the Government of the Union of Soviet Socialist Republics will take effective measures to prevent Soviet fishing trawlers on the high seas from damaging or cutting submarine cables in the future.

The Government of the United States further states that it will continue to fulfill its international obligations with regard to the protection of submarine cables.

CONVENTION FOR PROTECTION OF SUBMARINE CABLES (1884)

ARTICLE I

The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties.

ARTICLE II

The breaking or injury of a submarine cable, done wilfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communications, shall be a punishable offense, but the punishment inflicted shall be no bar to a civil action for damages.

This provision shall not apply to ruptures or injuries when the parties guilty thereof have become so simply with legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such ruptures or injuries.

* * *

ARTICLE VIII

The courts competent to take cognizance of infraction of this convention shall be those of the country to which the vessel on board of which the infraction has been committed belongs.

It is, moreover, understood that, in cases in which the provision contained in the foregoing paragraph cannot be carried out, the repression of violations of this convention shall take place, in each of the contracting States, in the case of its subjects or citizens, in

accordance with the general rules of penal competence established by the special laws of those States, or by international treaties.

* * *

ARTICLE X

Evidence of violations of this convention may be obtained by all methods of securing proof that are allowed by the laws of the country of the court before which a case has been brought.

When the officers commanding the vessels of war or the vessels specially commissioned for that purpose, of one of the High Contracting Parties, shall have reason to believe that an infraction of the measures provided for by this Convention has been committed by a vessel other than a vessel of war, they may require the captain or master to exhibit the official documents furnishing evidence of the nationality of the said vessel. Summary mention of such exhibition shall at once be made on the documents exhibited.

Reports may, moreover, be prepared by the said officers, whatever may be the nationality of the inculpated vessel. These reports shall be drawn up in the form and in the language in use in the country to which the officer drawing them up belongs; they may be used as evidence in the country in which they shall be invoked, and according to the laws of such country. The accused parties and the witnesses shall have the right to add or to cause to be added thereto, in their own language any explanations that they may deem proper; these declarations shall be duly signed.

ARTICLE XI

Proceedings and trial in cases of infractions of the provisions of this Convention shall always take place as summarily as the laws and regulations in force will permit.

ARTICLE XII

The High Contracting Parties engage to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment, either by fine or imprisonment, or both, of such persons as may violate the provisions of articles II, V and VI.

The international law questions involved in this problem are as follow :⁷

⁷ In analyzing this problem the following references will be helpful, IV Hackworth, *Digest of International Law* 243-247 (1940-44); Higgins and Colombos, *International Law of the Sea* 38, 262-264, 298-302; (2nd Rev. ed. 1950). I Hyde, *International Law Chiefly as Interpreted and Applied by the United*

1. Does a state with either publicly or privately owned submarine cables have the right to board and inspect a foreign vessel on the high seas when that vessel is thought to be guilty of damaging the cables either by intentional or culpably negligent action?

2. If a state has the right to board and inspect a foreign vessel under the above circumstances, does the right exist:

(a) Because both states are parties to the Convention for the Protection of Submarine Cables (1884); or

(b) Because customary international law has developed from the 1884 Convention and/or from general state practice so that the right of the aggrieved state (and the corollary duty of the injuring state) would exist even though one (or both) of the states was not a party to the 1884 Convention; or

(c) Because the states are parties to the 1958 Geneva Convention on the High Seas?

Subsidiary questions will be discussed in connection with the basic questions above, such as:

1. May a convention be interpreted in such manner as to accord the right to board and inspect a foreign vessel on the high seas when provisions of the convention do not expressly grant this right?

2. Does the 1884 Convention, customary international law, or the 1958 Geneva Convention give the right to an injured state to board a foreign war vessel, a foreign merchant or fishing vessel which is publicly owned; or only a foreign merchant or fishing vessel which is privately owned?

3. Is the Soviet Government bound by the provisions of the 1884 Convention which were signed by Czarist Russia, a predecessor government?

Q. 1. Does a state with either publicly or privately owned submarine cables have the right to board and inspect a foreign vessel on the high seas when that vessel is thought to be guilty of damaging the cables either by intentional or culpably negligent action?

International law, no less than other law, comes into existence to permit the world community of states to achieve certain values, among which is the protection against wrongful destruction of devices of communication owned by a state or the citizens thereof. Principles are formulated and rules promulgated unilaterally by states and accepted, modified, or rejected by other states with the result that eventually a body of commonly accepted principles and rules of cus-

States 1-20, 693-695, 751-753, (1945); I Lauterpacht-Oppenheim, *International Law*, 587-626 (8th ed. 1957); II Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776-1909, 1949-1957* (1910 ed).

tomary international law develop. In other instances, these established principles and rules, or totally new ones, are embodied in conventions signed and ratified by a number of states which are bound thereby. If the conventions codify customary international law then the principles and rules are binding upon all states, whether signatory to the convention or not.

The 1958 Convention on the High Seas, which the delegates from 86 states at the Geneva Conference (or at least the delegates from the 65 states voting for the Convention)⁸ agreed was codifying the rules of international law relating to the high seas, provides in Article 2 for a number of freedoms, including both "freedom of fishing" and "freedom to lay submarine cables and pipelines."⁹

The first question therefore may be rephrased as follows: If a state (Soviet Union) in the exercise of her acknowledged right to fish on the high seas interferes with and causes damage to the property of nationals of another state (United States) in the exercise of her equally valid right to lay, operate and maintain submarine cables, which right, if either, shall prevail over the other and what duties does each state owe to the other to safeguard the other's interests and rights?

In this problem situation both the United States and the Soviet Union are inclusive users of a common resource—the high seas. But generally speaking, a right to the free use of the high seas is not absolute in the sense that other users may be disregarded, endangered, impeded or excluded. Indeed, the 1958 Convention on the High Seas specifically provides that the freedoms enumerated, and others which are recognized by the general principles of international law, "shall be exercised by all States *with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.*"¹⁰ (emphasis added)

Therefore, although a Soviet trawler may fish in the high seas, it may not do so in a manner which endangers or interferes unreasonably with the right of the United States to operate and maintain her submarine cables. Later we shall note and discuss certain specific provisions of both the 1884 Convention and the 1958 Geneva Convention in relation to rights of the cable state and the corollary duties of the fishing state.

First, let us review briefly the history of submarine cables in relation to the problem at hand. When the first submarine cables were laid in 1851 it was only natural that states became concerned with

⁸ 2 *Official Records* (A/CONF. 13/38, 61 (1958)).

⁹ U.N. Doc. A/CONF. 13/L.53 and corr. 1, Art. 2 (2)–(3), (1958).

¹⁰ *Ibid.*, at Art. 2, par. 2.

the need for their protection. One theory advanced as a possible basis for such protection was that the doctrine of piracy, which permitted search and seizure of offending persons and vessels, could be extended to instances of willful damage to cables. A convention was proposed which would have embodied this concept, but it did not materialize.

Later, an international agreement was recommended and after protracted discussions, including rejection of the assimilation of the piracy doctrine to the destruction of cables, an international conference resulted in the Paris Convention of 1884. The United States and the Soviet Union are parties to this Convention.

Although the right to board and inspect a foreign vessel on the high seas is not specifically provided for in the 1884 Convention, the provisions of Article X of the Convention clearly contemplate such action. Article X provides in part,

“Evidence of violations of this convention may be obtained by all methods of securing proof that are allowed by the laws of the country of the court before which a case has been brought.”¹¹

Hence an injured state may use reasonable means to secure evidence of damages to its cables. Reasonable means would, of necessity, include the right to board and inspect the suspected vessel because in many instances it would not be possible to make a reasonably conclusive determination of the cause of the damage without such boarding and inspection.

The facts at hand prior to the boarding of the Soviet vessel reasonably supported the presumption that the breaks in the cables had resulted from the trawling activities since no other vessels were observed in the area at the times of the breaks. There was also good reason to believe that the breaks had been caused either by wilful or culpably negligent action since one of the breaks occurred in the late afternoon of February 25, 1959, after the aircraft had succeeded in dropping a note on the deck of the trawler advising it to cease trawling in the area.

After the boarding, the information obtained by inspection of the trawler's log, as well as the production by the master of the air-dropped message and denial of responsibility by the master, made further inspection by the boarding party both reasonable and necessary. The modest inspection of the trawler's upper decks and trawling gear without deep examination of the trawler, which revealed that of the twelve breaks in the five cables three were man-made cuts severing the cables, confirmed the suspicions of the United States boarding party.

¹¹ For the complete text see *supra*, p. 166.

Article X of the 1884 Convention also provides that

“When the officers (of the injured state) . . . shall have reason to believe that an infraction of the measures provided for by this Convention has been committed by a vessel other than a vessel of war, they *may require the captain or master to exhibit the official documents furnishing evidence of the nationality of the said vessel.*”¹² (emphasis added)

Here again the language of the 1884 Convention clearly implies the right to board the suspected vessel because there is no other way to require the captain or master to exhibit the official documents furnishing the evidence of the nationality of the vessel, other than requesting the captain to leave his ship and go aboard the inspecting ship. Nothing in the Convention or in international law would permit the inspecting ship to make such a request under the circumstances of the case. Thus, a visit by a boarding party of the inspecting ship to the trawler would be the only way to exercise the right granted to the inspecting ship under Article X. It should also be noted that Article X requires the boarding officer to make “summary mention of such exhibition . . . at once . . . on the documents exhibited,”¹³ an action which in most instances could only take place with the documents at hand and on board the suspected vessel.

Thus, it may be concluded that under the 1884 Convention for the Protection of Submarine Cables, the United States had a right to board and inspect the Soviet trawler in the manner in which it was done, the boarding party having conformed to all requirements of the Convention.

Q. 2. If a state has the right to board and inspect a foreign vessel on the high seas when that vessel is thought to be guilty of damaging the cables either by intentional or culpably negligent action, does the right exist,

(a) Because both states are parties to the Convention for the Protection of Submarine Cables (1884); or

(b) Because customary international law has developed from the 1884 Convention and/or from general state practice so that the right of the aggrieved state (and the corollary duty of the injuring state) would exist even though one (or both) of the states was not a party to the 1884 Convention; or

(c) Because the states are parties to the 1958 Geneva Convention on the High Seas?

¹² *Ibid.*

¹³ *Ibid.*

As indicated in the discussion of Question #1, the right of a state to board and inspect a vessel on the high seas is clearly implied by Article X of the 1884 Convention. Since both the United States and the Soviet Union are parties to that Convention they are accorded the rights and are subjected to the obligations thereof.

Of course, it might be argued that the present Soviet Government is a successor government to Czarist Russia which signed the 1884 Convention and is therefore not bound by the Convention. However, this line of argument is without foundation for three reasons: First, the general rule in international law is that a change in the form of government of a state, or a change from one ruler or one administration to another, does not terminate or modify its treaties.¹⁴ Lauterpacht-Oppenheim have written,

“As treaties are binding upon the contracting *States* changes in the Government, or even in the form of government, of one of the parties can, as a rule, have no influence whatever upon the binding force of treaties.”¹⁵

Second, in the present instance the Soviet Government failed to deny the applicability of the 1884 Convention, after the United States had invoked it in the Aide Memoire of February 28, 1959 and in the Note of March 23, 1959, as the basis for the claim of rights against the Soviet Government. The United States referred in the Aide Memoire to the 1884 Convention, “to which the Soviet Union and the United States are parties.”¹⁶ In the March 23 note the United States alluded to the 1884 Convention, “to which both the United States and the Union of Soviet Socialist Republics adhere.”¹⁷ It seems logical to assume that if the Soviet Union had not felt bound by the 1884 Convention she would have said so and dropped the matter there

¹⁴ Bishop, *International Law* 166 (1953); 5 Hackworth, *International Law* 360 (1940-1944); *Harvard Research in International Law, Treaties*, 29 A.J.I.L. Supp. 1044 (1935). “Unless otherwise provided in the treaty itself, the obligations of a State under a treaty are not affected by any change in its government organization or its constitutional system.” (*Ibid.*, at Art. 24.).

Since the Soviet Government is charged here as the injuring state, it is important to note that at times that state has asserted its freedom from certain treaties concluded by prior Russian Governments, but appears to recognize the continuing validity as to the Soviet Union of other pre-Soviet Russian treaties. See Harvard Research, *op. cit.*, 1052-54; Hazard, “The Soviet Union and International Law,” 43 *Illinois Law Review* 591, 594 (1948).

¹⁵ I Lauterpacht-Oppenheim, *International Law* 925 (8th ed. 1957).

¹⁶ See text *supra*, Ch. V, p. 165.

¹⁷ *Ibid.*

instead of claiming variously (a) that the Soviet trawler did not damage the cables, (b) there was no way of telling whether the Soviet trawler damaged the cable because other fishing vessels were in the area at the time and had previously damaged the cables, and (c) that the real purpose of the United States action and the press accounts thereof was a sheer fabrication to provoke the Soviet Union.

Third, the most conclusive reason why the Soviet Government could not avoid responsibility under the 1884 Convention by claiming that it was signed by a predecessor government, long antedating the present government, is that the Soviet Union has in fact adhered to the Convention.¹⁸

Although not too important in our actual case because of the right of the United States to board and inspect the Soviet trawler under the 1884 Convention, the next question is worthy of serious consideration: Whether the right of a state to board and inspect a foreign vessel exists because customary international law has developed from the 1884 Convention and/or from general state practice so that the right of the aggrieved state (and the corollary duty of the injuring state) would exist even though one (or both) of the states was not a party to the 1884 Convention?

Normally a treaty binds only the parties thereto under the principle *pacta tertiis nec nocent nec prosunt*. Hence, third parties generally do not have rights (or duties) under a treaty, unless, of course, the treaty expressly creates rights in third parties.¹⁹

However, it is possible for rights and duties to exist under a treaty for non-signatory parties thereto in at least four ways:

(1) If the treaty codifies customary international law, it is binding upon non-signatory states. Of course, it might be argued that the norm or law which binds the non-signatory states in this instance is not the treaty but the customary international law apart from the treaty. However, the binding force of principles and rules of customary international law which have been codified is generally greater than in the absence of such codification.

(2) Even though a state does not sign or ratify a treaty, it may accede to the provisions thereof later and hence be bound.

¹⁸ The Union of Soviet Socialist Republics is listed as a "party" to this Convention in *Treaties in Force* (U.S. Department of State, Office of the Legal Adviser, 1959), p. 250. According to Slusser and Triska, *A Calendar of Soviet Treaties, 1917-1957*, 55 (1959) "Soviet adherence" is based on a decree of February 2, 1926 and was implemented, concerning internal legislation, by decree of March 5, 1926.

¹⁹ I Lauterpacht-Oppenheim, *op. cit.*, footnote 15 (at 925-929 (and citations therein)).

(3) Even though a state has not ratified or acceded to a treaty, it may agree in a particular case or controversy to be bound by the obligations imposed on signatory states under the treaty, and, in certain instances, it may invoke the rights a treaty accorded to signatory states.²⁰

(4) Finally, when a treaty is signed and ratified by a number of states and is operative for a long period of time, without objections by non-signatory states to its provisions it may come to represent customary international law even though it was not a codification of customary international law at the time of its adoption.

It is the last situation above which is applicable to the question here. The 1884 Convention has been ratified by most of the important maritime states of the world²¹ and it has been operative for more than 70 years. Therefore, it seems reasonable to argue that, although this Convention did not represent a codification of customary international law in 1884, in the absence of objections by non-signatory states, a customary law has now developed which accords rights to, and imposes obligations upon, all states in the world community in line with those expressed in the Convention.

Moreover, apart from the long history of state practice under the 1884 Convention, the crucial need for rapid communication in this interdependent world is such that the right of a cable state to lay, operate, and maintain submarine cables (including in exceptional cases the right to board and inspect foreign vessels thought to have damaged the cables by willful or culpably negligent action) is a basic right of all states in the world community.

We must now consider the question of whether the right of the United States to board the Soviet trawler in the present case would exist if both states had ratified the 1958 Convention on the High Seas.

An analysis of Articles 26 to 29, inclusive, of the 1958 Convention indicates that while they do not include an express provision for the obtaining of evidence by the injured state as is provided in Article X of the 1884 Convention, implying the right under unusual circum-

²⁰ For example, the United Nations charter confers upon non-member states a number of rights. Under Article 32 non-member states have the right to participate in the discussion of disputes in which they are involved; under Article 35 they have the right to bring such disputes to the attention of the Security Council or the General Assembly; and under Article 50 non-member states have the right to consult the Security Council with respect to the solution of special economic problems arising from the application of preventive or enforcement measures. Jimenez de Arechaga, "Treaty Stipulations in Favor of Third States," 50 A.J.I.L. 338 (1956); 2 Hyde, *International Law* 1466, (2nd Rev. Ed., 1945).

²¹ *Treaties in Force, Dept. of State* 262 (1960).

stances such as in the present case of the cable state to board and inspect the foreign vessel reasonably thought to have caused the damage by willful or culpably negligent action, the right of a state whose cables have been damaged to obtain evidence is a necessary requisite to the performance of its obligations under the 1958 Convention.

Briefly, Articles 26 and 29 of the 1958 Convention accord the state certain rights (for which other states have corollary duties). The former provides the express right to lay cables which, of course, carries with it the right to take whatever reasonable measures are necessary to operate and maintain the cables with due regard to the rights of other states to use the high seas. The latter (i.e., Art. 29) gives the state the right to recover the cost of lost fishing gear which has been sacrificed to avoid injuring a submarine cable (or pipeline).

Articles 27 and 28 of the 1958 Convention impose certain duties (for which other states have corollary rights). Article 27 imposes the duty to legislate in order to make damage to cables by wilful or culpably negligent action a punishable offense. It should be noted at this point that the 1958 Convention, unlike the 1884 Convention, does not provide for a civil action for damages in addition to the punishment. However, despite this omission from the 1958 Convention, the general principles of international law with respect to state responsibility for damage to property of nationals of foreign states resulting from actions which are willful or culpably negligent would accord to the injured state the right to recover for such damage.

Article 28 imposes the duty upon a state to see that if its cable owners break or damage the cables of another owner (presumably either domestic or foreign), the injuring party shall bear the cost of the repairs. If this article had been broadened to include every person subject to the state's jurisdiction, rather than just cable owners, it would have been a much better provision. However, a fair interpretation of Article 28 as it is worded suggests that if a cable owner who damages another owner's cable must pay the cost of repairs, the same would apply to ship owners who damage a cable.

The main thrust of the first argument for contending that a state whose cables have been damaged may, under unusual circumstances such as those of the present case, board and inspect the vessel reasonably thought to be guilty of willful or culpably negligent action in breaking the cables is that each party to the 1958 Convention assumes certain duties to all other parties to take legislative action, the import of which is to see that its own and other state's cables may be laid, operated and maintained free from damage, or with recovery for damage if it occurs in a willful or culpably negligent manner.

The determination of the identity of the possible offender and the willfulness or culpability of the action requires the securing of all possible evidence both by the injured and the injuring states. For the most part this evidence will have to be gathered by the injured state since it is the one which will demand of the other state the three things which the United States demanded of the Soviet Union under the 1884 Convention, namely, (a) punishment of the offending party, (b) reservation of the right to make claims for damages, and (c) a request that the injuring state take effective measures to prevent further damage.²²

An even more compelling argument in favor of the conclusion that the United States would have the right under the 1958 Convention on the High Seas (if it were operative) to board and inspect the Soviet trawler under the facts of the case is that this Convention is a codification of international law relating to the high seas and that the provisions are "generally declaratory of established principles of international law."²³ Thus, in line with our previous arguments, since the 1884 Convention has developed into widely-practiced, customary international law relative to the right to lay, operate and maintain submarine cables, the rights and duties of all states as enunciated in the 1884 Convention and established through more than 70 years of state practice are codified by the 1958 Convention.

It is vital, of course, that ships of all states sailing the high seas be kept free from indiscriminate boarding and inspection by a foreign vessel. Some feel so strongly on this point that they have contended that the right to board and inspect is non-existent in times of peace with the exception of cases of suspected piracy.²⁴ However, the better view is that under unusual circumstances, such as those of the present case, an injured state may board and inspect a foreign vessel, other than a foreign warship, in order to gather evidence necessary for the fulfillment of its obligations and as a requisite to the full achievement of its rights under treaties and customary international law.²⁵

²² See text, *supra*, p. 166.

²³ Preamble to Convention on the High Seas. See Appendix B.

²⁴ II Moore, *Digest of International Law* 892 (1906); I Fauchille, *Traite de Droit International* 66 (1922).

²⁵ Article 22 of the Convention on the High Seas makes provision for a warship of one state to board a foreign merchant ship on the high seas under "powers conferred by treaty," such as those implied in Article X of the 1884 Convention. However, the rest of that article imposes strict limitations against boarding foreign merchant vessels on the high seas. Article 22 (1) provides:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not

One final question: Does the 1884 Convention, customary international law, or the 1958 Geneva Convention on the High Seas give the right to an injured state to board a foreign war vessel, a foreign merchant or fishing vessel which is publicly owned or operated, or only a foreign merchant or fishing vessel which is privately owned?

It is clear that nothing in the 1884 Convention or in customary international law gives one state the right to board and inspect a foreign war vessel. Moreover, under Article 8 of the Convention on the High Seas, which, as previously indicated, codifies established principles of international law, "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."²⁶ Therefore, if the Soviet trawler had been a warship as defined in the Convention²⁷ it could not have been boarded and inspected by the United States under any circumstances.

The real question, therefore, is whether the right to board and inspect a foreign vessel under circumstances such as those in this case is limited to privately owned vessels or may be invoked even though the vessel is owned or operated by the state.

The law as to the status of state-owned or operated vessels used for commercial purposes is not settled, although the trend in recent years in many states is to consider such vessels on the same basis as privately owned vessels.²⁸

Despite considerable opposition by the Soviet bloc at the 1958 Conference, the Convention on the High Seas as finally drafted contains a provision which puts state-owned or operated vessels used for commercial purposes on the same basis as privately owned vessels. Article 9 provides,

"Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."²⁹

The above provision implies that if the state-owned or operated vessel is used for commercial purposes (i.e., transportation, fishing,

justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. (See Appendix B for full text of the Convention on the High Seas.)

²⁶ Appendix B, Art. 8(1).

²⁷ *Ibid.*, at Art. 8(2).

²⁸ Bishop, *op. cit.*, footnote 14 (at 421). In recent treaties the United States has included a provision which puts state-owned vessels in the same class with privately-owned vessels.

²⁹ U.N. Doc. A/CONF. 13/L. 53 and corr. 1 (1958).

etc.) it is not immune on the high seas from the jurisdiction of states other than the flag state. Therefore, absent any limitation on this provision, the United States could have boarded and inspected the Soviet trawler under Article 9 in view of the special circumstances of the case.

However, Article 9 is not free from a limitation in so far as the Soviet Union is concerned because, in signing the Convention on the High Seas, she filed a reservation to this particular article, as follows:

“The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships.”

Because of the fact that a state is generally not bound by any provision of a treaty or convention to which she files a reservation, the Soviet Union would appear to have some basis for protesting the boarding and inspection of her trawler by the United States under the 1958 Convention on the High Seas, assuming, of course, that the Convention were operative as a result of ratification by the requisite 22 states, including the United States and the U.S.S.R.

One possible argument for holding the boarding and inspection of the Soviet trawler by the United States valid under the provisions of the 1958 Convention on the High Seas despite the Soviet reservation to Article 9 would be that the general practice of states in treating publicly owned or operated vessels on the same basis as privately owned vessels used for commercial purposes is sufficiently widespread to have established customary international law binding upon all states of the world community. Under this line of argument Article 9 of the Convention would be considered as a codification of existing international law which would be binding upon all states regardless of any reservations to this article.³⁰

It may be concluded with respect to the entire case that the United States had a right to board and inspect the Soviet trawler even though she may have been a publicly owned or operated vessel.

The right of the United States existed primarily because both states are parties to the Convention for the Protection of Submarine Cables (1884). In addition, the conclusion appears justified that the right existed also because customary international law relative to sub-

³⁰ This argument is worthy of serious consideration because the Convention on the High Seas does not contain a provision for a state to make reservations to any of the articles or sections thereof whereas the Convention on the Continental Shelf, adopted at the same time, does contain such a provision. Art. 12 of Convention on the Continental Shelf. Appendix D.

marine cables has developed from the 1884 Convention and from general state practice so that the United States could have boarded the trawler under the special circumstances of the case even though the United States and/or the Soviet Union had not been parties to the 1884 Convention.

Finally, there appears to be a strong basis for concluding that the right would exist under the 1958 Geneva Convention on the High Seas (assuming the Convention had been operative at the time of the incident, with both the United States and the Soviet Union as contracting parties) because the 1958 Convention constitutes a codification of international law which has become well established relative to laying, operating and maintaining submarine cables.

B. PROBLEM 2: Exclusion of a Foreign Ship From Nuclear Testing Area

FACTS: Members of the Peace Association in State A raised money to build and operate a small ship named The Peace Mission for the widely-announced purpose of navigating into State A's nuclear testing area on the high seas in a dramatic attempt to rally public opinion behind an effort on the part of scientists, religious leaders, and others to persuade State A to halt the tests.

The Peace Mission, registered under the flag of State A, was warned not to proceed with plans to navigate into the test area during a designated 30-day period when the next tests were to be conducted by State A. All states of the world had been informed of the location of the test area and the dates of the next tests by Notices to Mariners. The notices contained the following provision, among others: "All surface vessels of all states are prohibited from entering the test area during the test period."

Within the test area were several islands all of which were under the sovereignty of State A. The tests could not be conducted on State A's territory because of the density of its population.

Despite the warning, backers of The Peace Mission were adamant, announcing publicly that they intended to navigate into the test area. Shortly thereafter the Atomic Energy Commission of State A issued a regulation making it a crime for vessels or civilians of State A to enter the test area during the test period. Nothing was said in the regulation regarding foreign vessels.

Although officials of The Peace Association thought that the administrative regulation of the Atomic Energy Commission was unconstitutional, they decided to transfer the registration of The Peace Mission to State X, a state which had enjoyed a great increase

in ship registrations for several years because of “favorable” labor laws and low registration fees.

Flying the flag of State X, with officers and crew made up predominantly of citizens of State A, but with a few crew members from States X and Y, The Peace Mission sailed toward the test area, after stopping for refueling at an island under the flag of State A. While on the high seas some distance from the test area and just a few days prior to the start of the tests, The Peace Mission was overtaken by a coast guard cutter of State A which had pursued her from the island refueling port. The Peace Mission had slipped out of the island port without getting clearance to leave, after State A’s officials had refused to grant her permission to depart for the purpose of sailing into the test area.

The Peace Mission was well out to sea before her escape was detected. After several hours of pursuit the coast guard cutter of State A overtook The Peace Mission and forced her to turn back to State A’s island port, where she was detained until after completion of the nuclear tests and fined for having left the port without proper clearance.

The government of State X protested to the government of State A that the action of the cutter was a violation of international law.

The major international law questions involved in this hypothetical problem situation are these:

1. Whether a state has the right to designate an area of the high seas for nuclear tests (or for missile, rocket, or other tests) during a limited period of time, and, if so, what responsibilities the testing state has to insure a minimum of interference with other users in the test area and surrounding areas of the high seas?

2. Assuming that a state has the right to designate an area of the high seas for nuclear, missile, or other tests, whether the testing state may merely notify other states that it is a “danger area” from which all other users are cautioned to stay away during the test period, or whether the testing state may prohibit all other users from entering or otherwise using the test area during the test period?

3. To what extent may a testing state exercise jurisdiction over a foreign vessel on the high seas when the flag of the foreign state is essentially a “flag of convenience” without any “genuine link between the state and the ship” as required under Article 5 (1) of the 1958 Geneva Convention on the High Seas? ³¹

Q. 1: Whether a state has the right to designate an area of the high seas for nuclear tests (or for missile, rocket, or other tests) during a limited period of time, and, if so, what responsibilities the

³¹ See Appendix B for full text of the Convention.

testing state has to insure a minimum of interference with other users in the test area and surrounding areas of the high seas?

Although the legal right of a state to designate an area of the high seas for nuclear, missile, rocket or other tests is now widely recognized as a valid use of the high seas, a number of thoughtful persons oppose the continuation of the tests, particularly atomic and thermonuclear tests on the ground that they are legally and morally wrong. The moral arguments against such tests are (a) that the world cannot achieve peace if states continue to develop increasingly devastating weapons of destruction which are rapidly approaching the point of guaranteed annihilation; (b) that even though such horrible weapons are never used, the mere testing has an adverse genetic effect upon the human race because of the harmful fallout; and (c) that the sheer waste of human and physical resources in the entire armaments race, of which nuclear and missile testing is such a costly part, is morally indefensible.

The legal arguments against using any part of the high seas for nuclear tests were rather well summarized by Margolis in 1955³² in commenting upon the hydrogen bomb tests conducted by the United States in a 400,000 square mile area encompassing a number of islands held under a strategic Trusteeship Agreement with the United Nations. Margolis argued that the establishment of a vast warning area cannot be reconciled with "the international law principle of freedom of the seas and its attendant corollaries, freedom of navigation (of both the sea and the air), and freedom from interference with the lawful pursuit of maritime industries (fishing, transport, etc.)."³³ In addition to arguing that the tests were a violation of freedom of the seas, Margolis also claimed that they also violated both the United Nations Charter and the Trusteeship Agreement for the former

³² Margolis, "The Hydrogen Bomb Tests and International Law," 64 *Yale Law Journal* 629 (1955).

³³ *Ibid.*, at 630, 635. Also see Margolis, "The Legality of H-Bomb Tests," *The Nation* 570 (Dec. 31, 1955) in which he invokes both legal and moral arguments, saying, "Arguments of expediency couched in terms of defending the free world and human dignity become specious when placed against the clear requirements of the relevant rules of law and, by implication, of morality . . . the laws of humanity suggest and the law of nations requires immediate and permanent cessation of the thermonuclear experiments in the vast expanse of the Marshall Islands proving grounds." (*Ibid.*, at 572.) Also see the statement of Earl Jowitt in the House of Lords: "I am entirely satisfied that the United States, in conducting these experiments, have taken every possible step open to them to avoid any possible danger. But the fact that the area which may be affected is so enormous at once brings this problem: that ships on their lawful occasions may be going through these waters, and you have no right under international law, I presume, to warn people off." 186 *H.L. Deb.* 808-09 (5th Ser. 1954).

Japanese Mandated Islands and caused an illegal pollution of the high seas and the air space.

On the other hand, the legal arguments for the right of a state to conduct the nuclear tests have been effectively marshalled by McDougal and Schlei, in answer to the Margolis thesis.³⁴

While the claim of a State to use a designated area of the high seas for nuclear weapons testing is relatively recent and unprecedented, for the obvious reason that science and technology did not create such weapons until 1945, this new, emergent use of the high seas is a reasonable one. It is reasonable because it is a necessary requisite of self-defense. As McDougal has rightly concluded,

"The claim of the United States is in substance a claim to prepare for self-defense. . . . It has not been possible to establish, under the United Nations or otherwise, either effective international control of armaments or commitments and procedures of global scope which offer reasonable assurance against aggression. . . . The United States has undertaken its program of atomic and thermonuclear weapons development to ensure that these free nations are not lacking either in the retaliatory power which may deter aggression or in the weapons of self-defense if deterrence fails. In this posture of world organization and crisis, which puts so high a premium on self-defense, with authorization of potentially the most drastic interferences with others, it cannot, we suggest, be reasonably concluded that it is unreasonable for the United States to engage in such temporary and limited interferences with navigation and fishing as are involved in the hydrogen bomb tests, in preparation for the defense of itself and its allies and of all the values of a free world society."³⁵

Certainly the objective of defending all the values of a free world society is as important as, and indeed includes, the traditional uses of the high seas for navigation, fishing, cable laying, etc. Security is the keystone in the arch of all free world values and to be secure the United States and her allies must continue to test and perfect every type of defense weapon even though, it is to be hoped, these weapons never have to be used in defense of the Free World.

The Soviet Government has attempted to distinguish between designating an area of the high seas for nuclear weapons testing and rocket or missile testing. At the 1958 Geneva Conference the Soviet bloc

³⁴ McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 *Yale Law Journal* 648 (1955).

³⁵ McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 *A.J.I.L.* 356, 361 (1955).

tried desperately but without success to have inserted into the Convention on the High Seas a new succinctly-worded article: "States are bound to refrain from testing nuclear weapons on the high seas."³⁶

Yet, despite her vociferous objections to nuclear test areas on the high seas, the Soviet Government felt no hesitancy recently (January 7, 1960) in designating a fairly large area of the Pacific about 1,000 miles east of the Marshall Islands for some rocket tests, with the following announcement:

"On the basis of the progress made by the Soviet Union in the exploration of cosmic space with the help of ballistic rockets, and in conformity with their research program, Soviet scientists and designers are now working to develop a more powerful rocket to launch heavy earth satellites and undertake space flights to planets of the solar system.

"With a view to perfecting this rocket with a high accuracy of flight, its launchings without the last stage will be made within the coming months of 1960 into the central part of the Pacific Ocean, removed from places of intensive shipping, airlines and fisheries.

"The penultimate stage of the rocket is expected to fall within the area with the following coordinates:

"Latitude: 9.6 degrees north, 10.22 degrees north, 6.16 degrees north, 5.3 degrees north.

"Longitude: 170.47 degrees west, 168.22 degrees west, 166.16 degrees west, 168.40 degrees west.

"Special ships of the Soviet fleet will be dispatched to this area to carry out the necessary measurements.

"This first launchings of rockets will be undertaken somewhere between Jan. 15 and Feb. 15, 1960.

"To insure the safety of navigation and air traffic during the launching of rockets into the Central Pacific, Tass is authorized to announce that the Government of the Soviet Union asks the governments of the nations whose ships or aircraft may find themselves during this period in the vicinity of the area where the rockets might fall to see that the authorities concerned instruct the ship masters and aircraft

³⁶ 4 *Official Records* (A/CONF. 13/40, 124 (1958)). The Soviet bloc was also unsuccessful in getting the insertion of a provision banning naval or air ranges, as follows: "No naval or air ranges or other combat training areas limiting freedom of navigation may be designated on the high seas near foreign coasts or on international sea routes." (*Ibid.*) It is rather obvious that the main purpose of the Soviet bloc, with adequate land mass area in which to test nuclear weapons and missiles, was to cripple or eliminate similar testing by the Free World states who must of necessity use the high seas.

captains to refrain from entering the aquatorium [water] area and airspace of the Pacific designated by the above mentioned coordinates.”³⁷

Basically there is no distinction between designating an area of the high seas for atomic tests, thermonuclear tests, missile tests, rocket tests, or any other similar tests. In all cases the claim of right to use an area of the high seas for such purposes constitutes the equivalent of an *exclusive use* of the area by the testing state for a limited period of time, even though the claimant state never demands an exclusive use. The reason why the designation of the area constitutes an *exclusive use* by the testing state is clear: the danger to navigation, fishing, scientific research, cable laying, and other uses of the designated area during the testing period is such that all states other than the State conducting the tests will, as a rule, stay clear of the area.

It may be concluded that states have the right to designate limited areas of the high seas for the testing of atomic and thermonuclear weapons, missiles, rockets, etc., provided the testing program is reasonable. Whether it is reasonable depends upon a number of factors, among which are:

(1) There must be an actual, verifiable need to use the high seas as the test area. If the State has adequate land mass areas of its own for conducting the tests, or can enter into agreements with other states to use their land mass areas, the high seas which constitute a common resource of all states shall not be used.

(2) Adequate advance notice must be given to all states by the testing state as to the type of tests to be conducted, the period of time for the tests, and an accurate designation of the test area.

(3) The area selected must be in relatively isolated parts of the high seas little used for navigation, fishing, and other uses.

(4) The size of the testing area must be kept to the absolute minimum consistent with the safety of other concurrent users of the general area of the high seas.

(5) The period during which the tests are to be conducted must be kept as short as possible in order that interference with other users of the area will be minimized.

(6) Every precaution must be taken to insure that any tests (i.e., atomic and thermonuclear) which may have lingering after effects upon the conclusion thereof should not result in substantial and continued deprivation of other uses in the test area or in surrounding areas.

³⁷ *New York Times*, Jan. 8, 1960, p. 2, col. 4 & 5.

(7) At present it appears that the testing state will be responsible for the payment of damages for any injury to persons or property of foreign states outside of the designated test area. The liability upon the testing state shall be absolute because of the hazardous nature of the testing activity; a showing of willful or negligent injury shall be unnecessary.

Notwithstanding the conclusion that states have the right to designate limited areas of the high seas for the testing of weapons and scientific devices whenever the absence of available land mass territory necessitates the use of such areas of the high seas, it should be noted that the 1958 Geneva Conference passed a resolution which recognized "that there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas,"³⁸ and referred the matter to the General Assembly of the United Nations for appropriate action. Proposed by India, the resolution was approved in the Second Committee by a vote of 51 to one, with 14 abstentions,³⁹ and by the plenary meetings by a vote of 58 to none, with 13 abstentions.⁴⁰

Members of the Soviet bloc were the principal abstainers. The reason given by Tunkin of the U.S.S.R. was that his delegation believed that the Conference should deal with the question of nuclear tests and should adopt a positive rule to prohibit such tests in that they constituted a violation of the principle of freedom of the high seas.⁴¹ Of course, Tunkin could not know in March of 1958 that in January of 1960 his government would take the opposite view in designating a large area of the high seas for rocket tests thereby effectively eliminating the free use of those high seas by other states during a specified period.

In voting for the Indian resolution to refer the matter of nuclear testing to the General Assembly, and against the Soviet bloc proposal to add a new article which would have prohibited entirely the testing of nuclear weapons on the high seas, Dean, chairman of the United States delegation, pointed out that his government was not opposed to the prohibition of nuclear tests *provided* it was accompanied by effective international control. However, he reminded the tenth plenary meeting that unfortunately, owing to the attitude of the Soviet Union Government, no agreement had so far been possible

³⁸ U.N. Doc. A/CONF. 13/L.56 (1958). For the full text of this resolution entitled "Nuclear Tests on the High Seas," see Appendix F(1).

³⁹ 4 *Official Records* 52 (1958).

⁴⁰ 2 *Official Records* 24 (1958).

⁴¹ 4 *Official Records* 53 (1958).

and he expressed regret that the Soviet Union had boycotted the Disarmament Commission of the United Nations.⁴²

At first glance it appears that the expression in the 1958 Geneva Resolution of "a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas," negates the conclusion we reached above that states do have the right to designate areas of the high seas for various tests, provided land mass territory is not available. However the resolution does not negate our conclusion. As the United Kingdom delegate pointed out in the Second Committee, the Indian-sponsored resolution to the effect that apprehension about nuclear tests was a fact, did not indicate how many states had such apprehensions, or whether they were justified.⁴³

Moreover, as Sen of India made abundantly clear in the Second Committee, his government was in favor of a complete cessation of *all* nuclear explosions, whether conducted on land or on the high seas, because such tests were a crime against humanity and nuclear energy should not be used for destruction. Finally, it is clear that the main purpose of the Indian-sponsored resolution was not to condemn nuclear testing on the high seas apart from nuclear testing on land, nor to place a prohibition on the continuation of such tests, as the Soviet bloc proposal would have done had it passed but rather to refer the matter to the General Assembly as the best possible way to resolve the entire problem of disarmament, of which nuclear testing on the high seas is but a part.

Therefore, it may be concluded that the record of the 1958 Geneva Conference affirms rather than denies the right of states to continue designating areas of the high seas for nuclear and other tests (a) provided the tests are reasonable in terms of the requirements set forth above and (b) until such time as the United Nations can devise satisfactory controls and inspection systems in connection with total disarmament in the world community to make unnecessary the continuation of large-scale weapons testing on the high seas by the United States and her allies in order to insure the defense of all the values of a free world society.

One final point should be made. While it may be true, as someone once remarked, that petty consistency is the hallmark of little minds, it would appear to be unjustifiably inconsistent to contend, as the Soviet government has done, that the designation by the United States of an area of the high seas for nuclear weapons testing is an illegal violation of the freedom of the high seas, whereas it is valid for the

⁴² 2 *Official Records* 22-23 (1958).

⁴³ 4 *Official Records* 52 (1958).

U.S.S.R. to claim the right not only to establish a rocket test area (see above), but also the right to conduct naval maneuvers and conventional weapons testing in a designated area of the Arctic and warn vessels not to use the area during a specified period.⁴⁴

It is submitted that a state may legally designate a large warning area of the high seas for nuclear missile, or rocket tests (assuming always the non-availability of land mass for such tests), just as it may establish smaller warning areas for conducting naval maneuvers and weapons testing on a relatively small scale. The ultimate test in every case is the reasonableness of the action as measured by the tests indicated above.

Therefore, in the problem situation outlined, it may be concluded that State A had the right to establish the nuclear testing area on the high seas.

Q. 2. Assuming that a state has the right to designate an area of the high seas for nuclear, missile, or other tests, the next question is whether the testing state may merely notify other states that it is a "danger area" from which all other users are cautioned to stay away during the test period, or whether the testing state may prohibit all other users from entering or otherwise using the test area during the test period? The question may be asked in two parts: (1) May a state exclude vessels of its own state? (2) May a state exclude vessels flying the flag of a foreign state?

The first part of the over-all question posed above is a matter of domestic rather than international law, and hence will not be discussed here beyond saying that the United States has prevented ships registered under her flag from entering her nuclear test areas.⁴⁵ It appears to us that the action of the United States was justified, otherwise it would knowingly have permitted the suicide of some well-meaning citizens who, however noble their intentions to dramatize the inhumanity of nuclear warfare are, fail to realize the disastrous consequences of an unprepared Free World.⁴⁶ One purpose of a civilized state is to protect its citizens against their own folly, whether it be jumping off of high buildings, swallowing poison, or sailing into nuclear test areas.

With respect to the second part of the question (i.e., the right of a testing state to exclude foreign vessels), it seems clear that all any state may do under present international law is to designate the test area as a "danger zone" and notify all possible users thereof to stay

⁴⁴ *New York Times*, Sept. 3, 1957, p. 1, col. 6.

⁴⁵ *Bigelow v. United States*, 267 Fed. 2d 398 (1959), Certiorari denied, 361 U.S. 852, 4 Law Ed. 2d 91, 80 S. Ct. 113.

⁴⁶ Bigelow, *The Voyage of the Golden Rule* (1959); Reynolds, "Forbidden Voyage," 187 *The Nation* 358 (Nov. 15, 1958).

away during the test period. Nothing in international law or in the provisions of any of the four Geneva Conventions of 1958 confers upon a state the right to exclude foreign vessels from using an area of the high seas which has been designated for nuclear, missile, rocket or other similar tests, or even for naval maneuvers or conventional weapons testing.

This conclusion is not at variance with the conclusion reached in Chapter II. There it was held that the coastal state has a right under the Convention on the Continental Shelf to establish safety zones around continental shelf installations, which safety zones would then encompass what we designated as "protected high seas" from which the coastal state under certain circumstances would have not only the right but also the duty to exclude foreign vessels.

But the "protected high seas" within the safety zone are different from the high seas of a designated test area. As indicated in Chapter II, the "protected high seas" of the continental shelf safety zone normally may be used by all states for navigation, fishing, scientific investigation, etc., subject only to the condition that such use must not unreasonably endanger or impede the exploitation of the continental shelf resources. When the exploitation is unreasonable, endangered or impeded, as in the problem situation posed in Chapter II, the coastal state may exclude the foreign vessels until such time as the danger or impediment is removed.

However, the "protected high seas" of the continental shelf safety zone differ in several important respects from an area of the high seas designated for nuclear or other tests, differences which make it unreasonable to conclude that a testing state may prohibit foreign vessels from entering the test area.

First, by formulating the Convention on the Continental Shelf, the world community of states has sanctioned the creation of a safety zone by a coastal state around continental shelf installations and in doing so has given a special character to the high seas within the zone. The world community has also conferred certain express rights (and imposed certain duties) upon the coastal state with respect to controlling those "protected high seas" in connection with the exploitation of the continental shelf resources. The rights conferred include the right to prohibit vessels from using the "protected high seas" of the safety zone under certain extreme conditions.

By contrast, in designating a nuclear or other test area in the high seas, no state has been so bold as to claim the right to prohibit foreign vessels or aircraft from using such areas.⁴⁷ Nor does an international

⁴⁷ MacChesney, *U.S. Naval War College International Law Situation and Documents—1956* 611-629 (1957). It is true that the United States did designate some closed areas to all vessels and aircraft as of Jan. 7, 1956, but this

convention exist which even suggests that a state has the right to exclude foreign vessels from any area of the high seas (other than from the continental shelf safety zone). On the contrary, the Convention on the High Seas contains the express provision that "the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."⁴⁸

Second, the area of the "protected high seas" of the continental shelf safety zone under present contemplation is a relatively small area of the high seas as compared with the vast areas required for nuclear and other tests. The Convention on the Continental Shelf expressly limits the safety zone to a "distance of 500 metres around the installations and other devices which have been erected," with the specific requirement that "ships of all nationalities must respect these safety zones."⁴⁹

By contrast, the areas of the high seas designated by testing states for nuclear or other tests may be, and usually are, large. The United States test area for the hydrogen bomb tests covered 400,000 square miles. The area recently designated by the Soviet Government for rocket tests, although smaller than the United States thermonuclear test area, was vast as compared with the contemplated safety zone areas encompassing "protected high seas" around continental shelf installations.

Both the limitation of the safety zone to a small area, and particularly the right which is accorded the coastal state under the Convention on the Continental Shelf to demand the respect of its safety zone by foreign vessels give rise to the right to exclude such vessels from the safety zone if necessary. Stated another way, the right to

included the land areas of certain atolls and the three-mile territorial sea thereof. (*Ibid.*, at 627.) However, in areas of the high seas the United States has only established "danger areas." Similarly, the Soviet Government in its recent designation of the area of the high seas for her rocket tests made no attempt to exclude other users from the area, but only warned vessels and aircraft. (For the text of the Soviet announcement see, *supra*, p. 182.)

⁴⁸ U.N. Doc. A/CONF. 13/L.53 and corr. 1, Art. 2 (1958). Admittedly this statement in Article 2 of the Convention on the High Seas is stronger than is justified and less accurate than it should be, in view of (a) state practice, (b) other provisions of the four Geneva Conventions of 1958. For example, the Convention on the Continental Shelf gives the coastal state the right to build and maintain installations on the continental shelf which installations do constitute an exercise of sovereignty over a part of the high seas (i.e., the high seas occupied by the installations). Also, as pointed out previously, while a state may not purport to subject the high seas designated as a test area to its sovereignty, the effect is equivalent to an *exclusive use* (i.e., sovereignty) for a limited period of time because in most cases other users will stay away because of the danger.

⁴⁹ Convention on the Continental Shelf, Art. 5(3). See Appendix D.

exclude foreign vessels from the “protected high seas” of a small safety zone is justified not only because of the provisions of the Convention but also because of the fact that such exclusion in a few unusual cases would not greatly burden the excluded state.

On the other hand, in view of (a) the long history of the struggle for more than three centuries to protect the freedom of the high seas, and (b) the provision of the Convention on the High Seas which denies the right of a state to subject any part of them to its sovereignty⁵⁰ (unless as expressly provided in any of the Conventions—e.g., the continental shelf safety zones), it would be unreasonable to conclude that a state has the right to exclude foreign vessels from any area of the high seas without world community sanction, particularly from so large an area of the high seas as the test areas.

Third, one notes a decided difference in the possible need for a coastal state to exclude foreign vessels from the “protected high seas” of the safety zone around the continental shelf installations, as contrasted with the lack of any such possible need in a designated test area. Presently most of the continental shelf installations are permanent or semi-permanent. This being the case they cannot be moved readily to accommodate other users (i.e., those who wish to navigate, fish, conduct scientific research, lay cables, etc.). Hence, the coastal state must have the ultimate right to exclude other users from the safety zone whenever necessary in order to protect these installations and devices used in the exploitation of the natural resources.

By contrast, a state designating an area of the high seas for conducting nuclear or other tests does not need the right to exclude foreign vessels from the designated area in order to perform the tests. To be sure, if foreign vessels are not excluded from a test area they may suffer damage, but it is enough to warn them of the danger and then leave it to them to decide whether they wish to heed the warning or assume the risk of damage by entering the test area.

Therefore, since the need to exclude foreign vessels from the “protected high seas” of a safety zone may exist, and since there is no need to exclude such vessels from a designated test area in the high seas, the two types of high seas differ significantly, justifying the right of exclusion in certain unusual instances in the case of the safety zone, but not justifying it in the case of the designated test area.

Finally, the “protected high seas” of the safety zone differs markedly from the designated test area of the high seas in that in the former all states have a normal expectation of continuing use of the high seas around the continental shelf installations for navigation,

⁵⁰ See Appendix B.

fishing, and other uses while the coastal state is exploiting the continental shelf resources, whereas in the case of the designated test area there is no normal expectation of use during the test period because of the nature of the testing activity and, in fact, little use of the test area at any time because of its isolated location. While continental shelf installations may not be located in such a way as to interfere with the use of "recognized sea lanes essential to international navigation,"⁵¹ they may be located near such sea lanes and also in areas of the high seas which may be excellent fishing grounds where fishing would be conducted on a large scale by coastal and overseas fleets concurrently with the exploitation of oil or other resources from the continental shelf by the coastal state.

On the other hand, one of the tests of the reasonableness of the designation of a test area by a state is that the area selected must be in an isolated section of the high seas little used for navigation, fishing and other purposes. The hasty conclusion which might be drawn relative to this difference in expectation of use of the "protected high seas" of the continental shelf safety zone as contrasted with the use of the isolated test area of the high seas is that the former (i.e., safety zone) should not permit of exclusion of foreign vessels because of the possible serious burden to other users, whereas the latter test area could permit of exclusion without serious impairment of other uses because of little expectation of use of the isolated test areas. Yet, a more reflective consideration of the total problem, viewed from the perspective of the arguments marshalled above, particularly those based upon the provision of the 1958 Convention on the High Seas which codifies "the rules of international law relating to the high seas"⁵² in denying the right of any State to exercise sovereignty over any part of the high seas (except, of course, where other conventions may accord special rights such as in the case of the continental shelf safety zones), leads inexorably to the conclusion that testing states may not prohibit other states from using the vast test areas.

To permit the exclusion of foreign vessels from test areas could conceivably lead to spurious claims by states to large areas of the high seas, ostensibly for conducting nuclear, missile, rocket, or other tests, when in fact the claims would be for ulterior purposes inimical to the best interests of the total values of the free world society. Therefore, the basic, overriding principle of freedom of the high seas must prevail not only in all conventions which are written, but in the decisions which are made in various foreign offices and in the World Court and other international tribunals. The right of

⁵¹ Art. 5(6). See Appendix D.

⁵² Preamble to Convention on the High Seas. See Appendix B.

one state to exclude another from any area of the high seas, even for a limited time, must not be permitted, unless expressly authorized by an international convention (e.g., the Convention on the Continental Shelf) and only then in extreme circumstances such as those formulated in the problem situation in Chapter II where in imminent danger to the continental shelf installations justified the neutral coastal state in excluding from the "protected high seas" of the safety zone the warships of belligerents.

Therefore, it follows that State A could not exclude a foreign vessel from its nuclear testing area, although presumably it would not be liable for any damage suffered by the vessel or its personnel inside the test area on the theory that the foreign vessel, having been warned of the danger, assumed the risks of navigating into the area.

But here there is a real question as to whether the vessel, The Peace Mission, is in fact a *foreign vessel*. It is manned by officers and crew who were predominantly citizens of State A, and its flag was changed to State X largely for convenience in order to avoid the possible application of the administrative regulation of the Atomic Energy Commission which made entrance into a test area for vessels of State A a punishable offense. This leads to the next question.

Q. 3. To what extent may a testing state exercise jurisdiction over a foreign vessel on the high seas when the flag of the vessel is essentially a "flag of convenience" with some doubt as to the "genuine link between the state and the ship" as required under Article 5(1) of the 1958 Geneva Convention on the High Seas?

Article 5(1) provides as follows:

"Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship*; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."⁵³ (emphasis added)

The International Law Commission had the same provision in its final draft articles.⁵⁴ Just what constitutes a "genuine link" is nowhere defined by the Commission, nor did the 1958 Conference decide upon any tests for determining the matter. In its commentaries on the article, the Commission admitted that the terminology was vague and lacked precision, saying,

⁵³ U.N. Doc. A/CONF. 13/L. 53 and corr. 1 (1958).

⁵⁴ U.N. Doc. A/3159, 24, Art. 29 (1956).

"The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission preferred a vague criterion to no criterion at all. While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link with its new State."⁵⁵

At the 1958 Conference the United States and several other states, particularly Liberia and Panama, currently ranking third and sixth, respectively, in merchant fleet tonnage in the world,⁵⁶ opposed the "genuine link" provision. The Liberian delegate argued that the provision would lead to confusion,⁵⁷ and the Panamanian delegate not only criticized the lack of precision of the language but also contended that its use would encourage States to interfere in the internal affairs of others.⁵⁸

On the other hand, the United Kingdom delegate said that the article was acceptable as a statement of principle and that no attempt should be made to define the "genuine link" in greater detail and that, in any event, the job of definition was a specialized task for another body with more time and greater knowledge of the issues.⁵⁹ Other states concurred and the article was adopted.

Under the facts of our hypothetical problem it could be argued that there is no "genuine link between the state and the ship." The reason The Peace Association changed the registration was stipulated to be for the purpose of avoiding the application of the regulation of the Atomic Energy Commission of State A. Moreover, the majority of the officers and crew of the vessel are citizens of State A. Finally, The Peace Association which raised the money to build the vessel for the specific purpose of sailing into the nuclear test area is an association of State A.

Under the above analysis the facts seem to indicate a lack of any "genuine link" (whatever its exact tests) between the ship and State X, which brings into play another article of the Convention on the High Seas under which the coast guard vessel of State A would have the right to exercise jurisdiction over The Peace Mission even

⁵⁵ *Ibid.*, at 25.

⁵⁶ *Merchant Fleets of the World* (as of Dec. 31, 1958) U.S. Department of Commerce, Maritime Administration.

⁵⁷ 4 *Official Records* (A/CONF. 13/40, 63 (1958)).

⁵⁸ *Ibid.*, at 62.

⁵⁹ *Ibid.*

though she was flying the flag of State X. Article 22(1) of that Convention provides in part,

“1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting: . . .
(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”⁶⁰

On the other hand, it could be argued that ownership of the vessel and nationality of the crew are not elements of a “genuine link,” since proposals to take these into account were rejected by the Conference. The only requisite of Article 5 (1) cited above is that “the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”⁶¹

Since there is no evidence that State X did not exercise jurisdiction and control over the vessel, *The Peace Mission*, the more valid conclusion is that the testing state, State A, had no right to exercise jurisdiction over the vessel on the high seas.

⁶⁰ Appendix B, p. 203.

⁶¹ U.N. Doc. A/CONF. 13/L. 53 and corr. 1 (1958).